No. 18,801

United States Court of Appeals
For the Ninth Circuit

RICHARD W. BURGE,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

PETITION FOR REHEARING EN BANC

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To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rule 23 of this Court, Appellee herein respectfully petitions this Court for rehearing *en banc* in the above-captioned cause.

Oral argument in this matter was heard on December 12, 1963, before Chief Judge Richard H. Chambers, Circuit Judge Gilbert H. Jertberg and Senior Judge J. W. Madden, United States Court of Claims. The opinion and decision of this Court was filed on May 29, 1964, Judge Madden dissenting. Time for filing of a petition for rehearing was extended to July 29 by Judge Chambers and this petition is filed herewith within the time provided by provision of Rule 23 of this Court.

GROUNDS FOR GRANTING A REHEARING EN BANC

1. EFFECT OF THIS COURT'S DECISION.

The Court's previous decision is not an insignificant one which pertains only to this case. It will affect nation-wide law enforcement and is of such general importance as to merit review by the entire Court.

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2. THE TRUE ISSUE WAS NOT REACHED BY THE COURT.

The crucial issue in this case is not whether it is permissible to equate the landlord-tenant or the paying guest of a hotel or the lodger in a rooming house relationships to the "house guest" situation. Nor is it necessary to decide whether the express or implied permission to search given by a host of a "house guest" to those portions of the premises to which the house guest has access and uses with the express or implied permission of his host is binding on the house guest.

Appellee will assume, *arguendo,* that Appellant has standing to move to suppress Exhibits C and D, nevertheless it does not follow that this search was unreasonable. What the majority has overlooked, we respectfully submit, is that the consent of the hostess is not a waiver of her guest's constitutional rights (Cf. *Stoner v. California,* 376 U.S. 483, decided March 23, 1964). Rather, her consent is merely a lawful invitation to government agents to enter her premises and examine them just as she herself could do. Once the police officers were lawfully admitted, the only remaining question is to what extent their right to search is limited by the guest's right of privacy in his personal effects. The decisions make it plain that so

long as the search does not exceed the degree of exposure reasonably to be expected by an individual in leaving his possessions in an area subject to the sight and use of others it has been held reasonable.

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3. APPELLANT WAIVED HIS RIGHTS UNDER THE FOURTH AMENDMENT BY FAILING TO MAINTAIN PRIVACY IN HIS EFFECTS.

Even though the search may be directed at the possessions of a guest, it is reasonable so long as it does not exceed the degree to which the guest has voluntarily compromised the privacy of his possessions. Appellant waived his right to privacy in Exhibits C and D by leaving them in the only bathroom available for use by the occupants of, and visitors to, the host's apartment. Appellant may not now be heard to claim that his Fourth Amendment right of privacy in the narcotics paraphernalia was violated because law enforcement officers were among the visitors allowed in the premises by his hostess. Had he secreted them in an area reserved for her exclusive use or by locking them in a suitcase, for example, the situation would be different. Privacy connotes a degree of exclusiveness which Appellant has forfeited.

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4. THIS DECISION CONFLICTS WITH DECISIONS OF THIS COURT BOTH BEFORE AND AFTER JONES v. UNITED STATES, 362 U.S. 257 AND WITH THE MAJORITY OF CASES IN OTHER CIRCUITS.

The following decisions by this Court have upheld searches in similar situations:

Sartain v. United States, 303 F. 2d 859 (1962), cert. den., 371 U. S. 894;

Von Eichelberger v. United States, 252 F. 2d 184 (1958);

Cutting v. United States, 169 F. 2d 951 (1948);

Stein v. United States, 166 F. 2d 851 (1948), cert. den., 334 U. S. 844.

In addition to the decisions cited at pages 17 and 18 of Appellee's Brief in this case, attention is invited to *Calhoun v. United States,* 172 F. 2d 457 (C.A. 5, 1949), cert. den., 337 U. S. 938; *United States v. Rees,* 193 F. Supp. 849 (D. Md., 1961); *United States v. Sergio,* 21 F. Supp. 553 (E.D. N.Y. 1937); cf. *Holzhey v. United States,* 223 F. 2d 823.

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5. **THE COURT FAILED TO DISTINGUISH BETWEEN STANDING TO QUESTION A SEARCH AND THE REASONABLENESS OF THE SEARCH.**

A person aggrieved by a search may have *standing* to object but if the search is legal the evidence obtained as a result of the search is admissible regardless of his *standing.* The majority having determined that Appellant had such *standing,* automatically determines the search to have been illegal. But the search was legal, i.e., it was made with the consent of Dolores Jean Wright who had authority and control of the premises and could thus give valid authorization. None of the decisions cited by the majority are to the contrary.

In *Jones v. United States,* 362 U. S. 257, Jones, a guest, had sufficient *standing* but the Court didn't decide whether the search was legal. Unlike *Chap-*

man, 365 U. S. 610, where the Supreme Court held that the landlord did not have authority to consent to the search, Dolores Jean Wright did have that authority. *Jeffers,* 342 U. S. 48 parallels *Chapman,* supra. *Henzel,* 296 F. 2d 650, is inapposite for there the search was illegal. The Court's attention is also invited to fn. 18 in *Wong Sun v. United States,* 371 U. S. 471, 492 which clearly distinguishes *Jones* and *Chapman.* There, the Supreme Court held the narcotics inadmissible as to Toy but not as to Wong Sun because there was no invasion of the latter's property rights.

Dated, Anchorage, Alaska,
July 17, 1964.

Respectfully submitted,
JOSEPH J. CELLA,
United States Attorney,
H. RUSSEL HOLLAND,
Assistant United States Attorney,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify, that in my judgment, this petition for rehearing is well founded, and that it is not interposed for delay.

Dated, Anchorage, Alaska,
July 17, 1964.

JOSEPH J. CELLA,
United States Attorney.